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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a State Law Cause of Action in Tort Vests as a "Property" Interest Under the Fourteenth Amendment Due Process Clause at the Time the Cause of Action Accrues, or at Some Later Time, Such as When a Favorable Judgment on the Merits has Become Final and Unreviewable?

II. Whether the Fourteenth Amendment Due Process Clause Prevents a State Appellate Court From Depriving a Tort Litigant of Her Cause of Action by Retroactively Applying a State Supreme Court Ruling Which, Nearly Three Years After the Plaintiff Won Her Suit, Shortened the Applicable Limitations Period?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dolores J. Richards, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.

OPINION BELOW

The opinion of the Court of Appeals for the Fourteenth District of Texas in *Liberty Mutual v. Richards* is reported at 810 S.W.2d 232 (Tex. App.—Houston [14th Dist.] 1991, writ denied). *See* Appendix, 1a. The court denied Richards' motion for rehearing by unpublished order dated May 2, 1991. *See* Appendix, 7a. The Texas

Supreme Court denied Richards' application for writ of error without opinion on September 18, 1991. *See* Appendix, 9a. Finally, the Texas Supreme Court denied Richards' motion for rehearing of the application for writ of error by order dated November 6, 1991. *See* Appendix, 10a.

JURISDICTION

Richards invokes this Court's jurisdiction under 28 U.S.C. § 1257(3), as she asserted below and asserts here a deprivation of rights secured by the United States Constitution, specifically the Fourteenth Amendment Due Process Clause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution. It also involves Sections 16.003 and 16.051 of Texas Civil Practice and Remedies Code. The texts of these provisions appear in the Appendix at 11a.

STATEMENT OF THE CASE

This case involves a state appellate court's reversal of a plaintiff's judgment, nearly three years after that judgment, based on the retroactive application of a state supreme court ruling which shortened the applicable limitations period, despite the fact that the plaintiff's suit was timely according to the limitations period in effect at the time of her lawsuit and winning judgment.

Petitioner Dolores J. Richards was receiving workers' compensation benefits (for a work-related injury that required surgery) until January 12, 1983, when Liberty Mutual Fire Insurance Company terminated those benefits. *See Liberty Mutual Fire Insurance Co. v. Richards*, 810 S.W.2d 232, 233 (Tex. App.—Houston [14th Dist.] 1991), *reproduced in* Appendix, 1a-4a. Mrs. Richards filed suit to establish that Liberty Mutual wrongfully ter-

minated her benefits; this contract dispute was resolved with Richards winning a jury verdict in January, 1985. *See* Appendix, 2a. That winning judgment became final and unreviewable on April 30, 1986. *Id.* On March 7, 1986, shortly *before* her first judgment on the contract dispute became final and unreviewable, Mrs. Richards filed a second lawsuit (a tort suit) against Liberty Mutual, claiming that Liberty Mutual terminated her benefits in bad faith, thereby breaching its duty of good faith and fair dealing to insureds. *Id.*

In January of 1987, while Mrs. Richards' suit was still early in the discovery phase, the Texas Supreme Court, in *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex. 1987), unanimously decided that the limitations period applicable to a bad faith suit was two years, with the period to begin running at the time the underlying contract suit was ultimately resolved. Thus, according to *Arnold*, Richards' suit alleging bad faith termination of benefits was actually filed *prior* to the time that the limitations period began to run.[1]

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[1] Although Richards did not "rely" on *Arnold* in filing her suit, there was, of course, substantial reliance on *Arnold* by the parties, the attorneys, and the court in continuing with extensive discovery, jury selection, trial, etc., on the basis of *Arnold's* assurance that the suit was timely. Moreover, even in filing suit, Richards justifiably relied on Texas law. Texas law has both a two-year statute of limitations and a four-year statute of limitations. *See* Appendix, at 11a, *reproducing* Sections 16.003 and 16.051 of Texas' Civil Practice and Remedies Code. The two-year statute of limitations, by its terms, expressly appeared inapplicable, because it did not mention actions based on a breach of the duty of good faith and fair dealing, or any actions synonymous therewith. The general catch-all four-year statute of limitations therefore was the apparent limitations period prior to the decision in *Arnold*. (This is discussed in more detail at note 6 of this petition). Furthermore, *Arnold's* 9-0 decision drew on analogous areas of state law wherein bad faiths claims against insurance companies were held to accrue only at the time that related underlying lawsuits were ultimately resolved. *See Arnold*, 725 S.W.2d at 168. Surely litigants were also

Relying on the *Arnold* decision, the court and the parties proceeded to trial, where plaintiff won a jury verdict on the merits. 810 S.W.2d at 233, *reproduced at* Appendix, 2a. At that trial, Liberty Mutual's own claims manager testified that the justification given to Texas' Industrial Accident Board for termination of Mrs. Richards' benefits was false. *Id.* Not surprisingly, the jury found that Liberty Mutual did not have a reasonable basis for termination of Richards' workers' compensation benefits and awarded her $80,000.00 for mental anguish. *Id.* Further finding that Liberty Mutual's conduct was the result of conscious indifference to Richards' rights and welfare, the jury also awarded $3.5 million in exemplary damages. *Id.*

Liberty Mutual appealed, raising some fifty alleged points of error. Although the trial court entered a judgment for Richards on July 19, 1988, the Court of Appeals did not render an opinion until nearly three years later, on April 4, 1991. *See* Appendix, 1a. This delay was significant because, after briefing and oral argument in the Liberty Mutual appeal, the Texas Supreme Court, in *Murray v. San Jacinto Agency*, 800 S.W.2d 826 (Tex. 1990), overruled its limitations holding in *Arnold* by a 5-4 decision, changing the method by which the two-year limitations period is calculated. According to the Texas Supreme Court in *Murray*, the two-year statute of limitations should begin to run at the time the insurance company denies coverage (or, in this case, the time the insurance company terminates benefits) rather than at the later time when plaintiff has ultimately won the underlying contractual dispute and proved coverage. *Murray*, 800 S.W.2d at 829. The Fourteenth Court of Ap-

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justified in relying on these analogous areas of limitations precedent. It is also important to note that Richards can in no way be seen to have sat on her rights, due to the fact that she anticipated a tort cause of action that, at the time of her filing suit on March 7, 1986, the Texas Supreme Court had not yet recognized as a cause of action. Recognition of such a tort came in *Arnold*, on January 28, 1987. *See Arnold*, 725 S.W.2d 165, 167 (Tex. 1987).

peals then reversed Richards' judgment, applying the *Murray* decision retroactively and finding that her suit was time-barred! *Liberty Mutual*, 810 S.W.2d at 234, *reproduced at* Appendix, 3a, 4a.

Richards filed a motion for rehearing, arguing that the retroactive application of the new limitations ruling in *Murray* violated her Fourteenth Amendment right to due process of the law. *See* Appendix, 5a-6a. That motion for rehearing was denied, without opinion. *See* Appendix, 7a. The motion for rehearing was, of course, the first opportunity for Richards to raise the federal due process issue, since there were no due process issues implicated until the Court of Appeals retroactively applied *Murray* to unfairly deprive Richards of her "property" interest in the tort cause of action. The federal due process issue was raised again in a second motion for rehearing, which was also denied without opinion. *See* Appendix, 8a. Richards filed an Application for Writ of Error with the Texas Supreme Court. That application was denied, again without opinion. *See* Appendix, 9a. Richards then filed a Motion for Rehearing of the Application for Writ of Error, which the Texas Supreme Court also denied without opinion on November 6, 1991. *See* Appendix 10a. Richards reargued the federal due process violation to the Texas Supreme Court.

The ultimate result in this case is consistent with federal due process principles *only if*: (1) Mrs. Richards' tort cause of action (and subsequent judgment) was not "property" for due process purposes; or (2) any deprivation of property caused by the retroactive application of *Murray*'s limitations ruling survives due process scrutiny. Each of these issues is significant, undecided, and directly presented by the current case. Moreover, the first issue has generated a significant split in the lower courts, with some courts deciding the issue in a manner fundamentally inconsistent with an analogous line of this Court's due process precedent.

REASONS FOR GRANTING THE WRIT

I. The Issue of When a Tort Cause of Action Vests as a "Property" Interest Protected by the Fourteenth Amendment Due Process Clause Has Generated a Deep Split Among the Lower Courts, Has Been Resolved by Several Courts in a Manner Fundamentally Inconsistent with Analogous Supreme Court Precedent, and Is an Important yet Unresolved Federal Question Directly Presented by This Case.

The Fourteenth Amendment prohibits states from depriving individuals of life, liberty, or property without due process of law. The hallmark of "property," according to the Court, is an individual entitlement grounded in state law. *Logan v. Zimmerman*, 455 U.S. 422, 430 (1982); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court has traditionally held that the Due Process Clause protects civil litigants, including plaintiffs who seek to redress grievances in the courts. *Logan*, 455 U.S. at 429. In other words, a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. *Id.* at 428-429 (*citing Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 309 (1950)). Although the "property" interest in *Logan* was created by a state statute, there is no requirement that the cause of action be statutory in order to receive due process protection. For example, in *Coombs v. Getz*, 285 U.S. 434, 448 (1932), the Court ruled that a cause of action sounding in contract falls within the protection of the Fourteenth Amendment Due Process Clause. And, in *Martinez v. California*, 444 U.S. 277, 281-82 (1980), the Court assumed that a cause of action in tort (wrongful death) is a species of "property" protected by the Due Process Clause. With respect to tort causes of action, the Court in *Logan* left little doubt that such claims are indeed "property." *See Logan*, 455 U.S. at 430 n.5.

The lower courts have not seriously questioned whether a cause of action in tort creates "property"; rather, many

state courts and federal courts of appeals have questioned, and disagreed about, *when* that property interest "vests." There are two views as to when a cause of action in tort vests as "property" for Due Process purposes. One view is that a cause of action in tort does not become a vested property interest until the plaintiff has won a final and unreviewable judgment. Virtually all the federal appellate courts deciding the issue have adopted this "final victory" approach. *See, e.g., Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell v. American Cyanide Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Konizeski v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987). This view is shared by at least one state supreme court. *See Clausell v. Hobart*, 515 So.2d 1275, 1275-1276 (Fla. 1987).

The alternative view is that the property interest vests at the time the cause of action accrues—i.e., upon the occurrence of the facts which gives rise to the tort suit. Under this view, the cause of action itself is property, even prior to the litigant winning a final and unreviewable judgment. Virtually all of the state supreme courts interpreting this point of federal constitutional law have adopted, either expressly or implicitly, the "accrual" view. *See, e.g., Crier v. Whitecloud*, 496 So.2d 305, 308 (La. 1986); *Black v. Ball Janitorial Service, Inc.*, 730 P.2d 510, 514 (Ok. 1986); *Williams v. Hofley Manufacturing Co.*, 424 N.W.2d 278, 282 (Mich. 1988). State appellate courts have also been uniformly adopting the "accrual" view. *See, e.g., Brandt v. Brandt*, 468 N.W.2d 769, 772 (Wis. Ct. App. 1991); *Snoddy v. Teepak, Inc.*, 556 N.E. 2d 682, 685 (Ill. Ct. App. 1990); *Sisson v. Douglas County School District*, 351 S.E.2d 272, 274 (Ga. Ct. App. 1986). At least one recent federal court of appeals decision also recognizes that a wrongful death action constitutes a property interest even before it is reduced to a final winning and unreviewable judgment. *See Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441,

444 (5th Cir. 1991). Thus, in addition to a major split between federal and state courts, there is even a small split in the federal circuits on the issue of when a tort claim becomes "property."

Not only are the lower courts sharply split over this important question of federal constitutional law, but the view held by the majority of the federal circuits (the final unreviewable victory view) is in direct conflict with *Logan v. Zimmerman* and other decisions of this Court interpreting "property" for due process purposes. A plain reading of *Logan* reveals that it is the *cause of action itself*—i.e., the right of a litigant to bring an action—that constitutes "property" protected by the Due Process Clause. *See Logan*, 455 U.S. at 429. Indeed, the essence of due process is the opportunity to be heard, which cannot depend on whether, once heard, the individual is ultimately entitled to victory. The Court in *Logan* speaks of the "property" of "potential litigants" not "winning litigants." *See* 455 U.S. 422, 429-30. The Court emphasized that the Due Process Clause protects "plaintiffs *attempting* to redress grievances," not merely plaintiffs who have *successfully* redressed grievances. 456 U.S. at 429 (emphasis added).

The courts which have adopted the "final victory" approach to the vesting of tort claims as Due Process "property" are confusing litigants' property interest in *damages* ultimately won with their property interest in the *cause of action* itself. While the Due Process Clause certainly prohibits a state from depriving an ultimately victorious plaintiff of his monetary damages without due process, so too it prohibits states from earlier depriving him of his cause of action without due process (or, as in the present case, from depriving the litigant of both her victorious judgment, albeit a reviewable one, *and* her cause of action without due process). Although damages are perhaps more tangible property than a simple cause of action, the Supreme Court has expressly stated that *intangible* property, such as a cause of action, is also

protected by the Due Process Clause. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988). At the time the cause of action accrues, the desire for *monetary damages* may be a mere expectation of future benefit and thus not a "vested" property interest, but the *cause of action* is not a mere expectation. It has vested; and it "entitles" litigants to use the state's adjudicatory procedures (*fair* procedures) in an attempt to win monetary damages.

The "final victory" view is not only in conflict with one line of Supreme Court precedent, it is based on a misreading of an entirely separate line of Supreme Court cases which hold that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *See Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (*citing New York Central R.R. Co. v. White*, 248 U.S. 188, 198 (1917) and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978)); *Koniszeski v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987) (*citing* the same Supreme Court cases); *Eddings v. Volkswagenwerk*, 835 F.2d 1369, 1374 (11th Cir. 1988) (*citing* the same Supreme Court cases).

Significantly, neither *New York Central* nor *Duke Power* dealt with the retroactive application of a rule change which would extinguish or, in any way, affect a cause of action. *See New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) (the Court applied the workers' compensation law in effect at the time the cause of action accrued); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (no cause of action had accrued even at the time of Supreme Court review). Thus, *New York Central* and *Duke Power* stand only for the unremarkable proposition that persons generally (i.e., *those without a cause of action*) have no vested property interest in the continued vitality of any rule of law. And holding that persons generally have no property interest in the continued existence of any given

law does not foreclose holding, as the Court did in *Logan*, *Martinez*, and *Tulsa Professional*, that a person with a cause of action *does* have a property interest which can be deprived only with due process. Yet, many lower courts are reading *New York Central* and *Duke Power* in a way that obliterates the central teaching of *Logan*—that a cause of action, in and of itself, is property protected by the Due Process Clause.

The present case is a good vehicle to resolve the issue of when a tort claim becomes a vested property interest. Not only is the issue directly implicated on the facts of the present case, but it is outcome-determinative. If tort claims do not vest as property until a final unreviewable victory, then the petitioner has no "property" and thus no due process objection to the state appellate court's extinguishment of her claim through the retroactive application of a new rule for calculating the limitations period. On the other hand, if a tort cause of action vests at the time the cause of action accrues, or even at the time of receiving a favorable verdict on the merits, then the petitioner has "property" and the Texas appellate court's arbitrary extinguishment of her cause of action, by retroactively applying a "new" limitations ruling, constitutes an unconstitutional deprivation (as demonstrated by petitioner's argument on the second issue). In short, while the ultimate result in this case is consistent with due process if tort causes of action do not become vested property interests until final unreviewable victory, *that* is a view of "property" which is fundamentally inconsistent with *Logan v. Zimmerman*.

The magnitude of this issue for all state and federal tort litigants and potential litigants is apparent. If tort litigants have no property interest until a final unreviewable victory, then there are no due process implications to a state's arbitrary denial of those litigants' access to the courts or, as in the present case, a state's arbitrary destruction of both a verdict on the merits and the underlying cause of action. Moreover, the substantial appellate

delays occasioned by overburdened state judicial systems increases the chances that laws regarding filing and procedure will change between judgment and appellate review. For example, in the present case, the trial court entered a judgment for the petitioner on July 19, 1988, and the court of appeals did not render an opinion until nearly three years later! (April 4, 1991). By that time, of course, the method by which the applicable limitations period was to be calculated had changed, and the appellate court retroactively applied the "new" rule to deprive the petitioner of her judgment (and, indeed, her entire cause of action). Of course, no matter how extreme the delay, or how unfair the retroactive application of the "new" law, there are *no* due process implications in those jurisdictions which adhere to the "final victory" view of tort litigant "property." [2]

In sum, the issue of when a tort cause of action vests as "property" has generated a significant split among the lower courts on an important and unresolved federal question which potentially affects thousands of civil litigants [3] and is directly presented by this case. Moreover,

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[2] In many cases, though certainly not here, retroactive application of changes in the law may be completely consistent with due process, even if such application reverses an initial victory. For example, although a change in a procedural filing requirement, if applied retroactively, may completely *destroy* a cause of action, a change in substantive law may simply *define* that cause of action. *See Logan v. Zimmerman*, 455 U.S. at 433. This petition's second issue demonstrates why the retroactive application of a *limitations* decision violates due process. With respect to the preliminary "vesting" issue, we argue only that the retroactive application of such laws in a manner that destroys a cause of action, even one that has not been reduced to a final unreviewable winning judgment, should at least be subject to due process scrutiny.

[3] The "vesting" issue takes on even added significance in light of the increasing pressure on state legislatures to cap damage awards. Are such caps permissible? Can they be retroactively applied to those litigants whose tort causes of action have already accrued? To those litigants who have already won a judgment in excess of

many lower courts are adopting a view which is contrary to closely related Supreme Court precedent, by confusing two independent lines of Supreme Court authority. For all these reasons, this Court should grant certiorari, resolve this issue, and reverse the decision of the Fourteenth District Court of Appeals of Texas.

II. The Federal Constitutional Implications of a State's Destruction of a Litigant's Cause of Action Through the Retroactive Application of a Judicial Ruling Which Effectively Shortens the Applicable Limitations Period (Particularly the Process that Is Due Litigants Prior to Such a Deprivation) Is an Important and Undecided Federal Question Which Is Directly Presented by This Case; and This Court in Recent Opinions Has Given Mixed Signals Regarding the Correct Resolution of This Issue.

This Court has decided—and recently affirmed—that *federal* judicial decisions affecting limitations periods should be applied only prospectively. *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2333, 2339 (1990). This Court, however, has not decided whether the Fourteenth Amendment Due Process Clause prevents *state* courts from retroactively applying *state* judicial decisions that effect changes in the limitations period to litigants who had timely filed under the "old" period. In short, the Court has decided this retroactivity issue as a matter of *federal policy*, but not as a matter of *federal constitutional law*. Consequently, this Court has never decided the process that is due litigants before a state may destroy their "property" through the retroactive application of judicial rulings which effectively shorten limitations periods.

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the cap, but whose cases are still pending on appeal? Resolution of the "vesting" issue carries tremendous significance not only for this petitioner, but many other current and future tort litigants.

The general federal rule on retroactivity of judicial decisions is that appellate courts should decide cases in accordance with the law existing at the time of decision. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49 (1801). In other words, the general rule for judicial decisions is retroactivity. The Court, however, has recognized an exception to the general rule in cases where retroactivity would result in a "manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696, 717 (1974); *Gulf Offshore*, 453 U.S. at 486 n.16. And the Court has consistently found "manifest injustice" in the retroactive application of limitations decisions. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107-109 (1971); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *American Trucking Association, Inc. v. Smith*, 110 S.Ct. 2323, 2339 (1990). Just last term, while generally cutting back on *Chevron Oil's* non-retroactivity analysis, this Court did not disturb *Chevron Oil's* doctrine of non-retroactive application of decisions affecting statutes of limitation. *See James Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2446, 2448 (1991).

It seems self-evident that there are due process ramifications when a state appellate court's retroactive and "manifestly unjust" application of a new limitations period extinguishes a litigant's property interest. It is difficult to think of a term running more fundamentally counter to "due process" than "manifest injustice." Indeed, this Court in *Logan* emphasized that, while a state may elect not to confer a property interest, the adequacy of procedural safeguards for deprivation of such an interest, once conferred, must be analyzed in constitutional terms. 455 U.S. at 432. Nevertheless, a recent opinion of this Court creates some confusion on what seems to be a simple issue.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), the Court resolved an unsettled limitations issue and applied its ruling retroactively, thereby barring the *Lampf* litigant's lawsuit. *Id.* at 2782 (retroactive application is implicit in Part IV of the Court's opinion). The Court did not discuss, in any manner, the due process ramifications of its decision. The Court did not mention or apply the well-settled "manifest injustice" standard. Nor did the Court purport to overrule *Chevron Oil*, *Saint Francis College*, or *American Trucking*.[4] In Justice O'Connor's spirited dissent, she emphasized that *Chevron Oil* and *Saint Francis College* are based on fundamental notions of due process—i.e., that it violates due process to apply a limitations period retroactively and thereby arbitrarily deprive a party of his day in court. *Lampf*, at 2786 (O'Connor, J., dissenting). She based her opinion, in part, on the Court's determination that the retroactive application of a judicial ruling that changes limitations law is "manifestly inequitable." *Id.*, *citing Saint Francis College v. Al-Kazraji*, 481 U.S. 604, 608-609 (1987). Justice O'Connor also noted that none of the cases on which she was relying had been overruled. *Lampf*, at 2787 (O'Connor, J., dissenting).

A definitive resolution of this issue would not only resolve the tension between *Chevron* and *Lampf* (as well as the tension between *Logan* and *Lampf*), it would ad-

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[4] It is possible that the retroactivity in *Lampf* had no due process ramifications because the limitations issue in *Lampf*, unlike the one in the present case, was clearly unsettled throughout the entire course of the litigation. *See Lampf* at 2777. Consequently, there was no settled precedent which the Court overturned or upon which the plaintiff, *in any sense*, may have justifiably relied. It is also possible that there was no manifest injustice caused by the retroactive application, since it appeared that the plaintiff did not timely file even under the more generous limitations period that he argued was applicable. Or, perhaps *Chevron* has been silently overruled. The opinion just does not say.

vance the orderly and efficient operation of the civil justice system, so that the valuable time of courts, lawyers, and juries is not wasted unnecessarily. And, it is especially important to civil litigants that this court determine the process that is due them before a state may "retroactively" destroy their "property."

In this case, many persons justifiably relied on the *Arnold* ruling; and the attendant waste of resources is apparent. Although Richards did not rely on *Arnold* in *filing* the suit (because *Arnold* was decided subsequent to filing the suit), the present case does demonstrate substantial reliance on *Arnold*, not only on the part of the litigants, but also on the part of the court, the lawyers, the jury, the witnesses, etc. Both Mrs. Richards and Liberty Mutual conducted discovery in this case between March, 1986 and May, 1988. Extensive discovery was conducted subsequent to the Texas Supreme Court's decision in *Arnold*, which signalled the litigants, the lawyers, and the court, that Mrs. Richards' lawsuit was timely. In fact, during that period, Judge Wood conducted several hearings on discovery matters for which the lawyers spent hours in preparation. In the summer of 1988, again in reliance on *Arnold*, the judge, the twelve-member jury, the lawyers, and the witnesses, performed their duties during a trial which lasted nearly three weeks.

Even in *filing*, Mrs. Richards justifiably relied on what the pre-*Arnold* limitations law reasonably appeared to be.[5]

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[5] The Fourteenth Court of Appeals' opinion incorrectly assumes that, before *Arnold*, the controlling limitations law for Mrs. Richards' claim was not only settled, but contained in the Texas Supreme Court case of *Robinson v. Weaver*. *See Liberty Mutual v. Richards*, 810 S.W.2d 232, 233-34 (*citing Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977), *reproduced in* Appendix, 2a-3a. *Robinson*, of course, was decided ten years before the Court in *Arnold* even recognized that a claim such as Mrs. Richards' was a viable cause of action. Moreover, *Robinson* was a medical malpractice case and in no way discussed claims such as Mrs. Richards'. 550 S.W.2d at

Indeed, *Arnold* itself relied on preexisting analogous case law to decide, 9-0, that the two-year statute of limitations begins running when the underlying contractual suit is ultimately resolved. 725 S.W.2d at 168. Surely, if nine justices decide to rely on that analogous body of law, a litigant is similarly entitled to rely. Moreover, the pre-*Arnold* limitations period for Mrs. Richards' claim reasonably appeared to be the state's four-year statute of limitations (under which Richards' suit would also have been timely) rather than the two-year limitations period.[6]

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19. *Robinson* merely stated a general rule affecting limitations periods—i.e., that a cause of action generally accrues at the time facts come into existence that authorize a claimant to seek a judicial remedy. 550 S.W.2d at 19. *Robinson* in no way decided at what point, with respect to any given cause of action, those underlying facts exist. It was not until ten years later in *Arnold* that the Texas Supreme Court decided that, in a bad faith claim against an insurance company, the limitations clock does not start ticking until there has been *both* a denial of coverage (or termination of benefits) *and* a final resolution of the underlying contractual dispute. 725 S.W.2d at 168. Prior to the ruling in *Arnold*, neither *Robinson* nor any other case had settled the law to the contrary. Indeed, since *Arnold* reached its unanimous conclusion by relying on an analogous area of state limitations law, 725 S.W.2d at 168, it was *Arnold* and no other case that reflected "settled" law prior to the *Arnold* holding in 1987.

[6] Texas' two-year statute of limitations expressly applies to five causes of action which arise out of injuries to property rights, and one cause of action for "personal injury." *See* section 16.003(a), Texas Civil Practice and Remedies Code (Vernon 1986), *reproduced in* Appendix, 11a. Texas' four-year statute of limitations provides that "[e]very action for which there is no express limitations period . . . must be brought not later than four years after the day the cause of action accrues." Section 16.051, Texas Civil Practice and Remedies Code (Vernon 1986), *reproduced in* Appendix, 11a. A cause of action for the breach of duty of good faith and fair dealing is nowhere mentioned in section 16.003. We are not arguing that this Court should decide which of two state statutes of limitations applied to suits filed before the Texas Supreme Court's decision in *Arnold*. We point this out only to demonstrate what the limitations period reasonably appeared to be, a factor bearing on the quality of notice which, as argued in the text above, is a central aspect of due process.

In any event, even though the appropriate pre-*Arnold* limitations period was necessarily a question of state law, the clarity of that law certainly bears on the quality of notice provided to a litigant regarding the time within which she must file suit. And the quality of the notice provided to a civil litigant, whose cause of action constitutes a vested property interest, is itself a seminal due process issue. Moreover, Mrs. Richards can hardly be charged with sitting on her rights. She anticipated the cause of action for bad faith termination of her benefits, filing suit even before the Texas Supreme Court, in *Arnold*, recognized that a breach of an insurer's duty of good faith to insureds constitutes a viable cause of action. Of course, a new cause of action is not available to every person ever harmed by such a tort, whether five years ago, ten years ago, etc. But due process principles surely require some "grandfathering" before retroactively applying "new" limitations periods that destroy the property of litigants who have successfully anticipated "new" causes of action and whose cases are pending (or, in Richards' case, litigants whose cases have proceeded to a victorious judgment).

In sum, the reliance on *Arnold*'s apparently settled law, the retroactively applied changes in such law, and the misleading nature of the limitations law in effect at the time Richards filed her suit, are all part and parcel of the same due process issue—i.e., whether the state's adjudicatory procedures provided due process to Mrs. Richards prior to depriving her of her property interest. At a minimum, due process should require some "grandfathering" in those cases where the litigants, the court, the lawyers, etc., have relied in some substantial manner on apparently settled limitations law, as well as requiring some "grandfathering" for litigants who successfully anticipate state supreme court recognition of new causes of action and, in deciding what the applicable limitations period is, justifiably rely on the plain language of statutes and seemingly on-point state supreme court precedent. For

all the foregoing reasons, this Court should grant certiorari, resolve the apparent tension between *Chevron* and *Lampf*, and determine the process that is due litigants prior to the state's destruction of their "property" through the retroactive application of judicial rulings which effectively shorten limitations periods.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges the Court to grant a writ of certiorari to review the opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.

Respectfully submitted,

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Dated: January 31, 1992

APPENDIX

APPENDIX

COURT OF APPEALS OF TEXAS
HOUSTON (14TH DIST.)

No. C14-88-966-CV

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Appellant,

v.

DOLORES J. RICHARDS,
Appellee.

April 4, 1991

Rehearing Denied May 2, 1991

Ann Moore, Frank M. Bean, Houston, for appellant.

Kirk Purcell, A. Reagan Clark, David M. Gunn, Houston, Kenneth D. McConnico, Webster, for appellee.

Before PAUL PRESSLER, CANNON and ELLIS, JJ.

OPINION

ELLIS, Justice.

This appeal arises from a jury verdict in favor of appellee in her suit against appellant [Liberty Mutual] for breach of its duty of good faith and fair dealing to its insureds. Because the Texas Supreme Court has once again altered the law concerning the statute of limitations in cases against insurance companies, we must reverse.

Liberty Mutual terminated appellee's worker's compensation benefits on January 12, 1983. It argues that the

termination was reasonable because the decision was based on medical opinions. However, the record establishes that the opinions on which Liberty Mutual claims its decision was based were not received until after the decision to terminate benefits had been made. Liberty Mutual filed the required A-2 form with the Industrial Accident Board stating the reason for suspension of benefits was "[claimant] has been release[d] from doctor['s] care since 11/19/82." Liberty Mutual's own claims manager testified that the justification given to the Industrial Accident Board was false. The jury found that Liberty Mutual did not have a reasonable basis for terminating appellant's workers' compensation benefits and awarded appellant $80,000 for mental anguish. Finding that Liberty Mutual's conduct was the result of conscious indifference to appellant's rights and welfare, the jury also awarded $3.5 million in exemplary damages.

The parties in this case were faced with the uncertainty that necessarily accompanies the pursuit of emerging areas of law; however, this case was further complicated by the supreme courts' vacillating rulings on when the two-year statute of limitations begins to run on actions for an insurer's breach of its duty of good faith and fair dealing. For purposes of application of the statute of limitations, a cause of action generally accrues at the time facts come into existence that authorize a claimant to seek a judicial remedy. *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex.1977). That general rule was the controlling law at the time appellant's benefits were terminated in January of 1983.

Appellant received a favorable judgment in her contractual dispute with Liberty Mutual in January of 1985. That judgment became final April 30, 1986. Cases seeking recognition of a cause of action against insurers for breach of a duty of good faith and fair dealing were pending in the judicial system when appellant filed this suit on March 7, 1986. Following the general rule as stated

in *Robinson*, which was then controlling, appellant's cause would have been barred by limitations.

While this suit was in the discovery process, the supreme court decided *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex.1987). *Arnold* altered the general rule by holding that, "the statute of limitations does not begin to run on a good faith and fair dealing claim until the underlying insurance contract claims are finally resolved." 725 S.W.2d at 168. Because of the *Arnold* holding, this case proceeded to trial and a judgment in favor of appellee.

Shortly before this appeal was submitted, the supreme court once again altered the application of the two-year statute of limitations. *Murray v. San Jacinto Agency*, 800 S.W.2d 826 (Tex.1990), "modified" *Arnold*. The Texas Supreme Court held, "[o]ur limitations holding in *Arnold* is not consistent with the rule that limitations commences at the time facts come into existence which authorize a claimant to seek judicial remedy." 800 S.W.2d at 829, *citing Robinson*, 550 S.W.2d at 19. The court held that the injury producing event is the denial of coverage, and that "[l]imitations on a first party claim appropriately begins to run at denial, not the date a separate suit to determine coverage under the contract is resolved." 800 S.W.2d at 829. Under the *Murray* holding, appellant's case is once again barred by limitations.

The supreme court did not indicate whether it intended to limit the application of either *Arnold* or *Murray*, or whether it intended full retroactivity. The general rule is that a decision of a supreme court is to be retroactive in its operation. *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). Just as *Arnold* was applicable because this case was then pending in the judicial system, absent any contrary indication from the supreme court the *Murray* holding must control our disposition in this case now.

Although we may not agree with the Texas Supreme Court's ruling, as an intermediate appellate court we are bound to follow it. We must sustain Liberty Mutual's fifty-seventh point of error that appellant's cause of action was barred by limitations as a matter of law. Because of our disposition of this point of error, it is unnecessary to address the remaining points.

The judgment of the trial court is reversed.

PAUL PRESSLER, J., not participating.

[Excerpts from Motion for Rehearing and Request for Oral Hearing En Banc]

No. 14-88-00966-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Appellant,

v.

DOLORES J. RICHARDS,
Appellee.

Appealed from the 127th Judicial District Court
of Harris County, Texas

APPELLEE'S MOTION FOR REHEARING
AND REQUEST FOR ORAL HEARING EN BANC

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Dolores J. Richards

ORAL ARGUMENT REQUESTED

* * * *

IV. POINT OF ERROR FOUR: THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS BARRED MRS. RICHARDS' CAUSE OF ACTION BECAUSE THE RETROACTIVE APPLICATION OF A NEW STATUTE OF LIMITATIONS STANDARD DEPRIVED MRS. RICHARDS OF THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY THE TEXAS CONSTITUTION.

* * * *

PRAYER FOR RELIEF

For these reasons, Dolores J. Richards respectfully requests that this Court grant her Motion for Rehearing and affirm the judgment of the trial court. Additionally, Appellee seeks to recover costs of Court and prays for any further relief to which she may show herself to be entitled. Additionally, Appellee respectfully requests that the Court of Appeals order the publication of its opinion that was issued on April 4, 1991 be published.

Respectfully submitted,

/s/ Kirk Purcell
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Dolores J. Richards

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
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May 2, 1991

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RE: Case No. 14-88-00966-CV
Trial Court Case No. 86-14004

STYLE: Liberty Mutual Fire Insurance Company
V: Richards, Dolores J.

Counsel:

Please be advised that, on this date, the Court OVERRULED appellee's(s') motion for rehearing in the above cause.

Fuhther, application for writ of error, if any, must be submitted on or before Monday, June 3, 1991.

MARY JANE SMART
Clerk

By: /s/ Charlene Mitchell
Chief Deputy

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
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May 16, 1991

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RE: Case No. 14-88-00966-CV
Trial Court Case No. 86-14004

STYLE: Liberty Mutual Fire Insurance Company
V: Richards, Dolores J.

Counsel:

Please be advised that today, the Court DENIED appellee's(s') second motion for leave to file motion for rehearing in the above cause.

MARY JANE SMART
Clerk

By: /s/ Charlene Mitchell
Chief Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
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John T. Adams, Clerk

September 18, 1991

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RE: Case No. D-1178

Style: DOLORES J. RICHARDS v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Courtland Crocker
COURTLAND CROCKER
Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 6, 1991

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RE: Case No. D-1178

Style: DOLORES J. RICHARDS v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Courtland Crocker
COURTLAND CROCKER
Deputy

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Civil Practice and Remedies Code (Vernon 1986):

§ 16.003. Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

§ 16.051. Residual Limitations Period

Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.